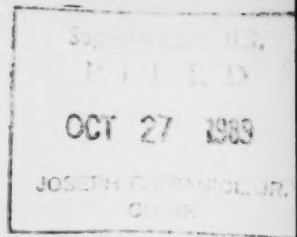


No.

89-922

In The



Supreme Court of the United States

October Term, 1989

MANU PATEL,

Petitioner

vs.

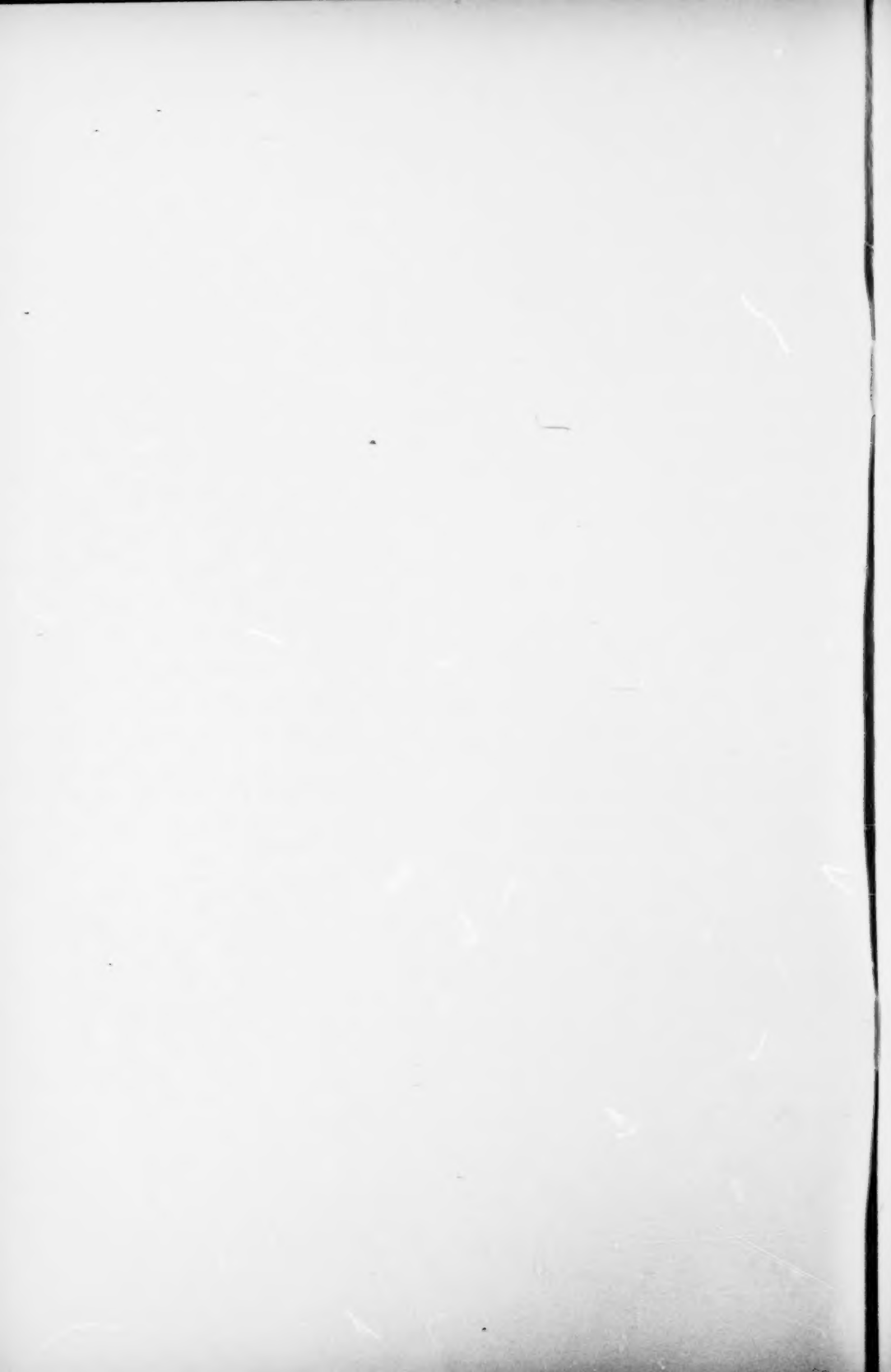
UNITED STATES OF AMERICA,

Respondent

Petition For A Writ Of Certiorari
To The United States Court Of Appeals, Seventh Circuit

Josette Skelnik
Robinson & Skelnik
167 East Chicago Street
Elgin, Illinois 60120
(312) 742-5220

Counsel For Petitioner



QUESTIONS PRESENTED FOR REVIEW

I. Are the statements of an unarrested defendant made "during the course of" a conspiracy so as to be admissible as co-conspirator's statements against the defendant, where the statements are made after the defendant has been arrested and after the controlled substances which were the object of the conspiracy charged have been seized by and are under the control of the government?

II. Are statements made by an unavailable declarant to a defendant who is cooperating with the government admissible against the cooperating defendant himself as co-conspirator's statements, where the statements are made in the course of conversations between the defendant and the declarant which were initiated by the defendant at the express request and direction of government agents?

TABLE OF CONTENTS

| | Page |
|-----------------------------------------------------------|------|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| OPINION BELOW | 1 |
| JURISDICTION | 2 |
| STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED | 3 |
| STATEMENT OF THE CASE | 4 |
| REASONS FOR GRANTING THE WRIT ... | 10 |

I.

| | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER STATEMENTS OF AN UNARRESTED CONSPIRATOR, MADE AFTER THE OBJECTIVES OF THE CONSPIRACY CHARGED HAVE ENDED IN FRUSTRATION OR DEFEAT, ARE INADMISSIBLE AGAINST NON- DECLARANTS UNDER FEDERAL RULE OF EVIDENCE 801(d) (2)(E), ON THE BASIS THAT SUCH STATEMENTS ARE NOT MADE "DURING THE COURSE OF" THE CONSPIRACY | 10 |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|

II.

| | |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
| THE SEVENTH CIRCUIT'S DETERMINA- TION THAT A DEFENDANT WHO IS ASSISTING THE GOVERNMENT MAY PRECLUDE THE USE AGAINST HIM OF OUT-OF-COURT, PRESUMPTIVELY UNRELIABLE STATEMENTS OF A CO- DEFENDANT ONLY BY CONFESSING HIS OWN GUILT VIOLATES FUNDAMENTAL PRECEPTS OF OUR SYSTEM OF JUSTICE, AND EXPANDS THE LIMITS OF THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE BEYOND CONSTITUTIONALLY PERMISSIBLE BOUNDS | 16 |
| CONCLUSION | 21 |
| OPINION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT | Appendix A |
| ORDER OF THE COURT OF APPEALS DENYING REHEARING | Appendix B |
| AMENDED ORDER OF THE COURT OF APPEALS DENYING REHEARING | Appendix C |

TABLE OF AUTHORITIES

| | Pages |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| <i>Anderson v. United States</i> , 417 U.S. 211 (1974) . | 20 |
| <i>Bourjaily v. United States</i> , ____ U.S. ____, 107 S.Ct. 2775 (1987) | 17, 20 |
| <i>Dutton v. Evans</i> , 400 U.S. 74 (1970) | 11, 19 |
| <i>Krulewitch v. United States</i> , 336 U.S. 440 (1949) . | 11, 14 |
| <i>Lutwak v. United States</i> , 344 U.S. 604 (1953) . . | 11 |
| <i>Simmons v. United States</i> , 390 U.S. 377 (1968) . | 18 |
| <i>United States v. Ammar</i> , 714 F.2d 238 (3rd Cir.) <i>cert. denied sub. nom Stillman v. United</i> <i>States</i> , 464 U.S. 936 (1983) | 12, 20 |
| <i>United States v. Burnett</i> , 582 F.2d 436 (8th Cir. 1976) | 13 |
| <i>United States v. Guerro</i> , 693 F.2d 10 (1st Cir. 1982) | 12 |
| <i>United States v. Hamilton</i> , 682 F.2d 1262 (6th Cir. 1982) <i>cert. denied</i> 459 U.S. 1117 (1983) | 12 |
| <i>United States v. Harris</i> , 542 F.2d 1283 (7th Cir. 1976) | 19 |
| <i>United States v. Jiminez</i> , 622 F.2d 753 (5th Cir. 1980) | 19 |
| <i>United States v. Killian</i> , 524 F.2d 1268 (5th Cir. 1975), <i>cert. denied</i> 425 U.S. 935 (1976) | 13 |
| <i>United States v. Meacham</i> , 626 F.2d 503 (5th Cir. 1980), <i>cert. denied</i> 459 U.S. 1040 (1982) | 13 |

| | |
|---------------------------------------------------------------------------------|--------|
| <i>United States v. Papia</i> , 560 F.2d 827 (7th Cir. 1977) | 12 |
| <i>United States v. Patel</i> , 879 F.2d 292 (7th Cir. 1989) | 16, 18 |
| <i>United States v. United States Gypsum Co.</i> , 438 U.S. 432 (1978) | 19 |



No.

In The

Supreme Court of the United States

October Term, 1989

MANU PATEL,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals, Seventh Circuit**

The petitioner, MANU PATEL, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on July 20, 1989.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 879 F.2d 292 and is reproduced in Appendix A, *infra*.

JURISDICTION

The petitioner was charged by indictment in the District Court, Northern District of Illinois, Eastern Division, with the offenses of conspiring to import, importing, and possessing with intent to distribute 2,743 pounds of a mixture containing hashish in violation of 18 U.S.C. Sec. 1952 and 21 U.S.C. Secs. 841(a)(1), 843(b), 846, 952, and 963. Following a jury trial, the petitioner was convicted of each offense and on August 26, 1988 was sentenced by the trial court, under the U.S. Sentencing Guidelines, to a term of 17-1/2 years imprisonment and a \$20,000 fine. Notice of appeal was timely filed pursuant to 28 U.S.C. Sec. 1291 and F.R.A.P. 4(b). On July 20, 1989 the United States Court of Appeals, Seventh Circuit, issued a decision affirming the petitioner's convictions and sentence. The petitioner's petition for rehearing was denied on August 29, 1989, and an amended order denying rehearing was entered on September 6, 1989. Copies of the order and amended order denying rehearing are reproduced in Appendix B and Appendix C, *infra*, respectively.

Jurisdiction to review the judgment of the Seventh Circuit Court of Appeals is conferred on this Court by 28 U.S.C. Sec. 1254(1).

**STATUTORY AND CONSTITUTIONAL
PROVISIONS INVOLVED**

Federal Rule of Evidence 801(d)(2)(E):

- (d) Statements which are not hearsay. A statement is not hearsay if - -

* * *

- (2) Admission by party-opponent. The statement is offered against a party and is . . .

- (E) a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy.

United States Constitution:

AMENDMENT V.

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

AMENDMENT VI.

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him .

STATEMENT OF THE CASE

The petitioner, Manu Patel, was charged by indictment with the offenses of conspiring to import, importing, and possessing with intent to distribute hashish in violation of 18 U.S.C. Sec. 1952, and 21 U.S.C. Secs. 841(a)(1), 843(b), 846, 952, and 963. He was found guilty of the offenses charged after a jury trial before the Honorable Charles P. Kocoras, Northern District of Illinois, Eastern Division and on August 26, 1988, was sentenced by Judge Kocoras, under the U.S. Sentencing Guidelines, to a term of 17-1/2 years imprisonment and a \$20,000 fine.

Manu Patel was the consignee of a shipment of 67 crates exported from India to the United States in January of 1988. According to the customs documents, the crates were to contain wooden furniture and handicrafts. In fact, 17 of the crates contained hashish, either alone or mixed in with jewelry boxes and other items. The shipment at issue had been sent to the States by Navin Sheth, an individual with whom Patel had conducted business in the past and who in the course of the previous year had sent two shipments of spices to Patel. On those past two occasions, once the shipments had arrived, Sheth himself came into the States and supervised the distribution of the spices. No controlled substances were ever found in these spice shipments, although they had been subject to intensive examinations by customs agents.

With respect to the shipment delivered in January of 1988, customs agents were directed to conduct an intensive examination of that shipment as well. Upon opening one

crate at random, U.S. customs inspector Richard Drummond discovered not furniture and handicrafts, but blocks of hashish. The crate was resealed and a decision was made to effect a controlled delivery of the shipment to the petitioner, who was then kept under 24-hour surveillance by Drug Enforcement Agency (DEA) agents from the date of the delivery of the shipment to him on January 28, 1988, until the date of his arrest three days later. During that three-day time period, DEA agents observed no unusual conduct on the part of the petitioner.

Patel was arrested on February 1, 1988 and the entire shipment was seized and placed in the custody of the federal government. At the time of the petitioner's arrest, none of the crates had yet been opened by him. When informed by DEA agent Scott Ando that the shipment he had received from Sheth contained hashish, Patel expressed surprise and indicated his willingness to assist the government in whatever way possible. In addition to giving the government access to the entire shipment, the petitioner also consented to a search of his home, conducted that same day. In the course of this search, agents seized numerous documents relating to Patel's business dealings with Sheth. However, no drugs whatsoever were discovered in the home.

Following the search of his home, Patel agreed to assist the government in identifying and apprehending members of the conspiracy at issue and, to that end, agreed to make a tape-recorded telephone call to Navin Sheth in India. DEA agent Ando insisted that during this conversation, Patel had to use the word "hashish" so that the agents could verify that Sheth had knowledge of the contents of the shipment. Patel expressed concern that using the word

hashish would make Sheth suspicious, since he, Patel, had no knowledge of the presence of the hashish. Nevertheless, Ando rebuffed Patel's suggestion that he simply tell Sheth the shipment had arrived and was in storage, which would then allow the agents to await Sheth's usual arrival in the States shortly thereafter, and instead contrived a story for Patel to provide to Sheth to explain how Patel had become aware of the presence of the hashish. Thus, Ando directed Patel to tell Sheth that while movers were helping him transport the crates into a storage facility, one mover had dropped a crate, which then broke open. Patel was then to tell Sheth that the mover had noticed the plastic containers of hashish and was concerned because he had been told the shipment contained furniture.

The agreed-upon telephone call was placed to Sheth at 6:00 p.m. on February 1. In addition to tape-recording the conversation, the government, with Patel's knowledge and consent, had an individual who understood the Indian language listen in on it. In the course of this conversation, after Patel told Sheth the story provided to him by agent Ando, Sheth made a number of statements incriminating Patel, suggesting that Patel knew of the true contents of the shipment and that the two men had discussed the importation scheme previously.

After this conversation took place, the petitioner, at the government's request, made a number of additional tape recordings from his home of telephone conversations between him, Sheth, and other individuals, which he turned over to the government. In the course of the February 1 telephone conversation with Patel, Sheth had told him that he would be receiving a telephone call on Tuesday, February 2, from an individual identifying himself as "John."

No telephone call materialized on that day. Several days later, however, Patel did receive a telephone call from such an individual and, at the government's direction, made arrangements with this individual to deliver a portion of the shipment of hashish to him. Patel also agreed to wear a body wire to his meetings with this individual and his conversations with the individual were tape-recorded through this wire. As a result of the petitioner's work for the government, four individuals -- Peter Guinan (the individual identifying himself as John); Patrick Montisci; John Johnson; and Thomas Whitebean --were arrested on February 8, 1988 and charged with conspiracy and various other offenses. Sheth remained in India and was never apprehended, although he was indicted along with the other defendants.

Although Peter Guinan and Patrick Montisci testified at the petitioner's trial pursuant to the terms of a plea agreement reached with the government, neither they nor Johnson and Whitebean knew Patel, had ever seen him before, or had ever heard his name mentioned previously. Each of these four individuals subsequently pleaded guilty to the charge of conspiracy pursuant to agreements with the government. In accordance with the terms of these agreements, the government moved in each case for a departure from the sentencing guidelines pursuant to Guideline 5K1.1, which allows a departure, on motion of the government, from the sentence range set by the guidelines where a defendant has substantially assisted the prosecution in the investigation or prosecution of another person who has committed an offense. As a consequence, these defendants received sentences recommended by the government which ranged from 2-1/2 years to 5 years, sentences which were substantially lower than those they

faced under the guidelines.¹ The government refused to similarly move for a departure from the guidelines at Patel's sentencing hearing.

Prior to trial, the petitioner filed a motion seeking to preclude at trial the use of the statements made to him by Navin Sheth during and subsequent to the February 1 telephone call placed at the request of the government. The petitioner asserted that these statements did not qualify as co-conspirator's statements under Federal Rule of Evidence 801(d)(2)(E) because, by the time of the first call on February 1, the conspiracy in question had terminated and, in addition, Patel could not be considered a member of the conspiracy at that time because he was working for the government. The district court denied the motion and the statements of Sheth constituted key evidence admitted against the petitioner at trial.

The petitioner filed a direct appeal from his convictions and sentence to the Seventh Circuit Court of Appeals pursuant to 28 U.S.C. Sec. 1291 and F.R.A.P. 4(b). On appeal before the Seventh Circuit, the petitioner again contended that the statements of Sheth were inadmissible as co-conspirator's statements and, in addition, that their admission at trial denied the petitioner his Sixth Amendment right of confrontation.

In affirming the petitioner's conviction, the Seventh Circuit did not address his contention that by the time of the first telephone conversation with Navin Sheth, the

¹ Under the guidelines, for example, Peter Guinan faced a minimum sentence of 14 years imprisonment. Pursuant to the terms of the plea agreement with the government, he received a sentence of 5 years imprisonment.

conspiracy charged had terminated. With respect to the issue of whether Patel could be considered a member of the conspiracy at that time, the Court determined that there were only two methods whereby an individual could withdraw from a conspiracy, thereby rendering statements made by others subsequent to his withdrawal inadmissible as co-conspirator statements: by communicating abandonment of the conspiracy to unarrested conspirators; or by making a clean breast to authorities. While acknowledging that advising the unarrested conspirators of the abandonment of the conspiracy was not a viable alternative in the case at bar, since Patel was working with the government to deceive the others into believing the conspiracy was ongoing, the Court nevertheless found that the petitioner was still responsible for statements made by unarrested conspirators because he had not confessed to the authorities. Accordingly, the Court reasoned, Sheth's statements were properly admitted against the petitioner under the co-conspirator exception to the hearsay rule. The petitioner's petition for rehearing was denied by the Seventh Circuit in an order entered August 29, 1989, and an amended order denying rehearing was entered on September 6, 1989.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD RESOLVE THE ISSUE OF WHETHER STATEMENTS OF AN UNARRESTED CONSPIRATOR, MADE AFTER THE OBJECTIVES OF THE CONSPIRACY CHARGED HAVE ENDED IN FRUSTRATION OR DEFEAT, ARE INADMISSIBLE AGAINST NON-DECLARANTS UNDER FEDERAL RULE OF EVIDENCE 801(d)(2)(E), ON THE BASIS THAT SUCH STATEMENTS ARE NOT MADE "DURING THE COURSE OF" THE CONSPIRACY.

In the case at bar, the petitioner, along with five other individuals, was charged with conspiracy to import hashish into this country from India. The petitioner was arrested for this offense on February 1, 1988 and, at the same time, the entire shipment at issue was seized and placed in the custody of the federal government. Thereafter, acting at the request and direction of the government, the petitioner successfully deceived various unarrested conspirators into believing that the goals of the conspiracy were still attainable. As a result, the government was able to arrest and successfully prosecute four others.

Although it is clear that with the petitioner's arrest and the seizure of the hashish at issue the objective of the conspiracy charged had ended in defeat, the government was nevertheless allowed to introduce against the petitioner at trial statements made to him by an unarrested

conspirator subsequent to the petitioner's arrest. In both the district court and the Seventh Circuit Court of Appeals, the petitioner contended that these statements were inadmissible against him under Federal Rule of Evidence 801(d)(2)(E) because they were made after the conspiracy charged had terminated. The district court perfunctorily rejected this argument; the Seventh Circuit simply ignored it. The action by both courts is inconsistent with long-established precedent from this Court and with the bulk of authority from other circuits.

This Court has consistently held that statements made by an alleged co-conspirator after a conspiracy has terminated are inadmissible against anyone but the declarant. See, e.g., *Krulewitch v. United States*, 336 U.S. 440 (1949), *Lutwak v. United States*, 344 U.S. 604 (1953), and *Dutton v. Evans*, 400 U.S. 74 (1970). Difficulties arise in determining at precisely what point termination has been established and, in this regard, this Court has addressed only a few specific factual situations. Thus, in *Krulewitch*, this Court held that statements made during the concealment phase of a conspiracy were not made during the course of and in furtherance of the conspiracy charged and therefore were inadmissible as co-conspirator's statements in a federal court proceeding. This Court has consistently followed that rule, notwithstanding the fact that some states allow the use of such statements as co-conspirator statements under their own rules of evidence. See, *Dutton v. Evans*, 400 U.S. 74 (1970)

Although the circuit courts which have addressed the issue of when a conspiracy terminates have focused on the particular facts of the case before them, in a majority of the circuits a general rule has evolved that statements made

by unarrested conspirators after the arrest of other alleged conspirators are admissible as co-conspirator's statements only if, at the time statements of the unarrested individuals are made, continuation or effectuation of the conspiratorial objective is still possible. See, e.g., *United States v. Guerro*, 693 F.2d 10 (1st Cir., 1982), (although defendant who supplied controlled substances for distribution had been arrested, statements made thereafter by an unarrested co-conspirator were made in the course of the conspiracy, in view of the fact that the defendant's arrest was on unrelated charges, that he expected to be released on bail, and that he and other conspirators contemplated a continuation of their drug-related activity); *United States v. Ammar*, 714 F.2d 238, 253-54 (3rd Cir.), cert. denied sub. nom *Stillman v. United States*, 464 U.S. 936 (1983), (conspiracy to import and distribute heroin did not end with the arrest of several conspirators where there was affirmative evidence showing that the unarrested co-conspirators continued to import and attempt to sell heroin; court finds that defendants must show conspiracy has terminated, "such as by demonstrating that its ends had been so frustrated or its means so impaired that its continuation was no longer plausible."); *United States v. Hamilton*, 682 F.2d 1262 (6th Cir., 1982), cert. denied 459 U.S. 1117 (1983), (where co-conspirators, charged with conspiring to engage in business of dealing in explosives without a federal license, continued to order explosives, continued to deal with unarrested co-conspirators who had supplied them with explosives in the past, and continued to make plans to collect money due them, statements they made were admissible as co-conspirator's statements despite the fact that one of the parties who had supplied explosives in the past was under arrest and cooperating with the government), *United States v. Papia*, 560 F.2d 827 at 835

(7th Cir., 1977), (while effectuation of the conspiratorial purpose had to be postponed while the "heat" was on, "the evidence established that the conspiracy remained alive and the defendants remained prepared to strike when a safe opportunity presented itself"); and *United States v. Burnett*, 582 F.2d 436 (8th Cir., 1976), (statement made by defendant charged with using the telephone to facilitate narcotics conspiracy was made in the course of the conspiracy even though made to an unarrested co-conspirator who was cooperating with the government, in view of the fact that the defendant continued to distribute narcotics even after the co-conspirator's arrest and other co-conspirators remained at large and might well be continuing their wholesaling of drugs -- but see concurring opinion, finding that conspiracy had terminated by the time of the telephone call). The Fifth Circuit has referred to the "general rule" existing in that circuit that "the arrest of co-conspirators puts an end to the conspiracy." *United States v. Meacham*, 626 F.2d 503 at 511, n.8 (5th Cir., 1980), *cert. denied* 459 U.S. 1040 (1982). See, also, *United States v. Killian*, 524 F.2d 1268 (5th Cir., 1975), *cert. denied* 425 U.S. 935 (1976), (statements made by an unarrested defendant after two co-conspirators were arrested and the controlled substance which was the subject of the conspiracy charged had been seized by the government were made after the termination of the conspiracy and were inadmissible against the defendant's co-conspirators). In sum, the general rule, adopted by a majority of circuits addressing the issue, is that a conspiracy terminates when its objective has ended in frustration or defeat. Indeed, the Advisory Committee's note to Rule 801(d)(2)(E) comments that the rule "is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved."

Such a position was first adopted by this court in *Krulewitch v. United States*. In that case, addressing the issue of whether a statement made by an alleged co-conspirator of the defendant subsequent to the co-conspirator's and defendant's arrest was admissible against the defendant, Your Honors stated:

The statement plainly implied that petitioner was guilty of the crime for which he was on trial. It was made in petitioner's absence and the Government made no effort whatsoever to show that it was made with his authority. The testimony thus stands as an unsworn, out-of-court declaration of petitioner's guilt. *This hearsay declaration, attributed to a co-conspirator, was not made pursuant to and in furtherance of the objectives of the conspiracy charged in the indictment, because if made, it was made after those objectives either had failed or had been achieved.* Under these circumstances, the hearsay declaration attributed to the alleged co-conspirator was not admissible on the theory that it was in furtherance of the alleged criminal transportation undertaking. 336 U.S. at 442 (emphasis added).

In its brief before the Seventh Circuit, the government relied on cases which hold that defendants may be found guilty of conspiracy even if, because of circumstances unknown to them, attainment of the conspiratorial objective is unlikely or impossible. Based on those cases, it contended that a conspiracy does not end simply because its goals, theoretically attainable at the outset, have subsequently ended in defeat. There are three basic flaws in the application of this analysis to the case at bar.

First, the cases cited by the government deal only with the issue of whether a defendant may be found guilty of the offense of conspiracy where the conspiratorial objective has not been, and is not likely to be, attained. Those cases do not address the issue of when such a conspiracy terminates for purposes of rule 801(d)(2)(E). The petitioner has never contended that he could not be found guilty of conspiracy because the objectives of the conspiracy had ended in defeat, but is simply asserting that some limits on the admissibility of statements against an accused by unavailable declarants must be recognized.

Secondly, the government's analysis ignores the fact that in the case at bar, the unarrested conspirators continued to work toward the conspiratorial objective only because the petitioner, acting at the request and direction of the government, successfully deceived them into believing that objective was still attainable. Thus, unlike the situations posited by the government, where conspirators continue to work toward the conspiratorial objective regardless of the government's involvement, here the conspirators continued to work toward the conspiratorial objective only *because* of the government's, and the petitioner's, involvement.

Finally, the government has never proposed what the test should be for determining when a conspiracy terminates. Surely, this Court never intended to adopt a rule which would breathe life into a defunct conspiracy for as long as the government, using arrested defendants as artificial life-support, is able to convince any unarrested conspirators that the conspiracy is still alive.

Nevertheless, in the case at bar, the Seventh Circuit appears to have implicitly adopted a rule that a conspiracy

continues, for purposes of Rule 801(d)(2)(E), for as long as any individual who can be considered a member of it subjectively believes it is capable of success, regardless of whether, in reality, its objectives have been defeated. (879 F.2d at 294-5) Accepting such a viewpoint would expand the boundaries set by this Court in *Krulewitch* beyond recognition and effectively obliterate any limits on the admissibility of statements by out-of-court declarants under Rule 801(d)(2)(E).

At the time Navin Sheth made the statements which were introduced against the petitioner at trial, the conspiracy charged in the indictment had terminated. Certiorari should be granted to clarify the rules to be applied in determining at what point a conspiracy has terminated, and to avoid the use of an ever-expanding definition of conspiracy which renders the limits imposed by Rule 801(d)(2)(E) meaningless.

II.

**THE SEVENTH CIRCUIT'S
DETERMINATION THAT A DEFENDANT
WHO IS ASSISTING THE GOVERNMENT
MAY PRECLUDE THE USE AGAINST HIM
OF OUT-OF-COURT, PRESUMPTIVELY
UNRELIABLE STATEMENTS OF A CO-
DEFENDANT ONLY BY CONFESSING HIS
OWN GUILT VIOLATES FUNDAMENTAL
PRECEPTS OF OUR SYSTEM OF JUSTICE,
AND EXPANDS THE LIMITS OF THE CO-
CONSPIRATOR EXCEPTION TO THE
HEARSAY RULE BEYOND
CONSTITUTIONALLY PERMISSIBLE
BOUNDS.**

The Seventh Circuit held in this case that a defendant who maintains his innocence is liable, under Federal Rule of Evidence 801(d)(2)(E), for statements made by others who are members of a charged conspiracy, even though those statements are made to the defendant himself while he is cooperating with the government in an effort to identify and apprehend members of the conspiracy. Absent a confession of guilt, the Court held, the defendant is deemed to be a member of the conspiracy charged until the unarrested conspirators have been apprehended, and cannot withdraw from the conspiracy by working for the government and furthering its objectives. The Court's decision expands the limits of the co-conspirator exception to the hearsay rule to a point never envisioned or approved by this Court and penalizes a defendant, who has done everything requested of him by the government and whose assistance has resulted in the arrest and successful prosecution of four other individuals, for asserting his innocence. Because of the important constitutional questions raised by this case, the petitioner asks that a writ of certiorari be granted.

Despite the fact that this Court has recognized that co-conspirator's statements are presumptively unreliable -- See, *Bourjaily v. United States*, ____ U.S. ____, 107 S.Ct. 2775 at 2781 (1987) -- the Seventh Circuit began its analysis of the instant case based on the premise that statements made by Navin Sheth implicating the petitioner were true and that Patel was caught in a trap of his own making. (879 F.2d at 293) From that premise, the Court concluded that, having joined a conspiracy, Patel could not withdraw from it, so as to limit his liability for statements made by others, simply by taking steps to defeat or disavow it or to bring others to justice. Instead, the Court held, a defendant may

withdraw from a conspiracy in only two ways: by communicating abandonment of the conspiracy to unarrested conspirators; or by making a "clean breast" to authorities. (879 F.2d at 294)²

The Court recognized that, since the government wanted Patel to work with it to convince the unarrested conspirators that the conspiracy was still ongoing, and since Patel agreed to do so, withdrawing from the conspiracy by announcing abandonment of it to the others was not an option available to him. Therefore, in order to protect himself from statements of unarrested conspirators made in furtherance of a conspiracy which the Court itself admitted was no longer capable of success at the time Sheth's statements were made (see 879 F.2d at 295), Patel had no choice but to confess.

Thus, in order to protect himself from an evidentiary rule allowing into evidence statements incriminating him which were made by an unavailable declarant, the petitioner was required to forego two constitutional rights: his privilege against self-incrimination and his presumption of innocence. Such a harsh, unrealistic, and unworkable rule should not be sanctioned by this Court. *Compare Simmons v. United States*, 390 U.S. 377 (1968), (requiring a defendant to forego his Fifth Amendment privilege against self-incrimination in order to assert a Fourth Amendment claim creates an intolerable tension between the two constitutional rights and demands application of a rule that testimony given by a defendant in support of a motion to suppress may not thereafter be admitted against him at trial.) Moreover, application of such a rule is doubly

² Death was mentioned briefly by the Court as a third possible means of withdrawal, but thereafter discounted.

inappropriate in this case, where the government's own inept directions to the petitioner as to what to tell Sheth likely aroused Sheth's suspicions from the outset and gave him reason to misrepresent Patel's involvement in the offense. Cf. *Dutton v. Evans*, 400 U.S. 74 (1970)

The Seventh Circuit found that its formulation as to the test to be applied for withdrawal was "endorsed implicitly" by this Court in *United States v. United States Gypsum Co.*, 438 U.S. 432 at 463-65 (1978). In fact, no such endorsement can be gleaned from that decision. In *Gypsum*, this Court found an instruction to the jury regarding what acts constituted withdrawal from a conspiracy to be reversible error because it limited the jury's consideration "to only two circumscribed and arguably impractical methods of demonstrating withdrawal from the conspiracy." Thus, in *Gypsum*, this Court, far from determining that the test for withdrawal is confined to only two possible methods, determined only that the trial court in that case had not gone far *enough* in formulating the test for the jury. Certainly, requiring a defendant to confess in order to avoid incrimination by others establishes a method of withdrawal which is not only circumscribed and impractical in the extreme, but unconstitutional.

In adopting its formulation here, the Seventh Circuit, without explanation or comment, repudiated the position endorsed in its earlier decision of *United States v. Harris*, 542 F.2d 1283 (7th Cir., 1976) which found that termination of membership in a conspiracy may be established, in general, by showing that the individual took some affirmative act to disavow the conspiracy or defeat its purpose. 542 F.2d at 1301. See, also, *United States v. Jiminez*, 622 F.2d 753 at 755 (5th Cir., 1980), (finding that

the *Gypsum* case stands "at least for the proposition that '[w]ithdrawal from a conspiracy may be demonstrated in a variety of ways.'"). In light of the fact that the rationale for admitting against a defendant statements made by an alleged co-conspirator is the theory that each conspirator is acting as an agent of the other -- See, *Anderson v. United States*, 417 U.S. 211 at 218, n.6 (1974); *United States v. Ammar*, 714 F.2d 238 at 255-56 (3rd Cir.), cert. denied sub. nom *Stillman v. United States*, 464 U.S. 936 (1983); and *Bourjaily v. United States*, _____ U.S. _____, 107 S. Ct. 2775 at 2785-2788 (1987), (Blackmun, J., dissenting) -- the Court's formulation of the test in *Harris* made eminently good sense: an unarrested conspirator cannot be said to be speaking as an agent for an arrested individual who is cooperating with the government in an effort to identify and apprehend members of the conspiracy.

As applied in the case at bar, the Seventh Circuit's formulation of the test for withdrawal penalizes a defendant who has indisputedly aided the government simply because that defendant continues to assert his innocence. Certiorari should be granted to address the issues raised by this case as to the proper interpretation and scope of the co-conspirator exception to the hearsay rule, and to correct the Seventh Circuit's interpretation of the rule in a manner which offends an accused's constitutional rights.

CONCLUSION

Wherefore, the petitioner, MANU PATEL, respectfully requests that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

**JOSETTE SKELNIK
Robinson & Skelnik
167 East Chicago Street
Elgin, Illinois 60120
(312) 742-5220**

Counsel for Petitioner



APPENDIX A

**In the United States Court of Appeals
For the Seventh Circuit**

No. 88-2738

United States of America

Plaintiff-Appellee

Versus

Manu Patel,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

(July 20, 1989)
(Rehearing Denied August 29, 1989)
(Amended Order Denying Rehearing
Entered September 6, 1989)

Before POSNER and MANION, Circuit Judges, and
ESCHBACH, Senior Circuit Judge.

POSNER, Circuit Judge:

A jury convicted Manu Patel of four counts of violating federal narcotics law in connection with the importation from India of a ton of hashish having a street value of at least \$4 million. The judge sentenced him to seventeen years and six months in prison. The appeal raises a number of issues but the only one that merits discussion is whether Patel was still a member of the conspiracy to

import and distribute the hashish at the time his principal co-conspirator, Sheth, made statements that were recorded and later admitted into evidence against Patel; Sheth did not testify.

Customs inspectors had discovered the hashish in a shipment (purportedly of furniture and artifacts) from the Apex Trading Agency of Bombay to Global Impex, Inc., which had the same address as Patel's home in Roselle, Illinois. After the inspection, the shipment was allowed to continue on its way, accompanied however by federal agents. Its interim destination was a warehouse. When Patel arrived with moving trucks to remove the shipment from the warehouse, the agents arrested him and informed him that the crates contained hashish. Patel exhibited surprise, and claiming that he had nothing to hide agreed to cooperate with the government. He told the agents that he and Navin Sheth, a resident of India, were co-owners of Apex Trading Agency, that this was the third shipment he had received from Sheth, and that the previous ones had consisted of spices and groceries. Patel volunteered that Sheth was planning to phone him shortly from India with instructions for the distribution of the latest shipment. He added that after each of the first two shipments, Sheth had come to Roselle to inspect the shipments, and together with two other Indians, one named Raji, had carried away parts of the shipments in a U-Haul truck before Patel distributed the rest.

The agents wanted Patel to make recorded phone calls to Sheth in which Patel would tell Sheth that a crate had broken open during the unloading of the shipment and had spilled hashish. The agents insisted that Patel use the word "hashish" in the calls. The phone conversations, conducted in an Indian dialect, were recorded, translated, and

transcribed, and the transcripts were introduced into evidence at Patel's trial, over his objection. In the first and most important of the calls, after telling Sheth about the spill of the hashish, Patel asked, "Who is going to call?" Sheth was taken aback: "Didn't I tell you Tuesday morning?" Patel played dumb: "Tuesday morning? Somebody is going to call? ... You? Would you call?" "No, I wouldn't call. He will call you." "But, who is he?" To which Sheth replied: "Why you have been told about it? Why did you forget?" Patel: "Raj, Raj, Raj." Sheth: "You are Raj Kumar." As the call continued, Sheth became increasingly suspicious. He asked, "why are you using that word?" (presumably "hashish"). He added, "You know about all this to be not using them." In later calls, Sheth, swallowing his suspicions, gave Patel directions for the distribution of the hashish. As a result of the information conveyed by Sheth in these calls, as well as information obtained in calls that Patel made at the government's direction to members of the ring in the U.S., the other members - all but Sheth - were arrested. Sheth remained in India, and for reasons that no one has been able to explain to us cannot be extradited to the U.S. to stand trial for his part in the conspiracy.

The transcripts of the calls to Sheth exploded Patel's pretense of being an unknowing recipient of the hashish, and although there was other evidence of his involvement in the smuggling ring the government does not argue that the admission of the transcripts, if error, was harmless. The "theory" under which a co-conspirator's out-of-court statement is admissible is that each member of the conspiracy is the agent of every other member, and an agent's admission binds his principal. See Fed. R. Evid. 801(d)(2)(E); *Lutwak v. United States*, 344 U.S. 604, 73

S.Ct. 481, 97 L.Ed. 593 (1953); *United States v. Ammar*, 714 F.2d 238, 255-56 (3d Cir. 1983). The Advisory Committee's Note remarks the fictitious character of the agency rationale but does not question the rule. Patel, noting that the rule requires that the co-conspirator's statement be made "during the course and in furtherance of the conspiracy," Fed. R. Evid. 801(d)(2)(E); see also *Krulewutch v. United States*, 336 U.S. 440, 443, 69 S.Ct. 716, 718, 93 L.Ed. 709 (1949), argues that when he made the calls to Sheth at the government's behest, he had quit the conspiracy, so Sheth was no longer his agent.

There is nothing in the rule about withdrawal, and of course a conspiracy could continue, and statements be made in the course and furtherance of it, after a particular member had withdrawn. But then it would not be a co-conspirator's statement; it would be a former co-conspirator's statement. See *United States v. Mardian*, 546 F.2d 973, 978 n. 5 (D.C.Cir. 1976); *United States v. Abou-Saada*, 785 F.2d 1, 8(1st Cir. 1986); cf. *United States v. Smith*, 578 F.2d 1227, 1233 (7th Cir. 1978). At all events, the government does not argue the point, but instead replies to Patel's claim that he had withdrawn from the conspiracy before the call by arguing that the only way to quit a conspiracy is to confess involvement in it to the government or to notify your fellow conspirators that you're quitting. Pressed at argument, the government's counsel reluctantly conceded that death might be a third way out, but she would acknowledge no other modes of exit. Since Patel did not die and since the government did not want him to announce his withdrawal from the conspiracy to Sheth and the other conspirators, the government's position is that the only way Patel could quit the conspiracy after being arrested was by confessing.

As an original matter this conclusion might be questioned. A conspiracy is an agreement, but it is an agreement without formalities, and an agreement made informally can be dissolved informally. The same applies to the collateral agreement joining a particular individual to the conspiracy. All that would be required for withdrawal, one might think, would be proof that the individual was no longer a party. Making a clean breast to the government is one way of indicating that one has quit - although it is not conclusive, for one might make a clean breast one day and repent of it the next and resume participation in the conspiracy. Notifying one's co-conspirators that one has quit is another way. Death is a third. One supposes there could be others. Patel contends that while he did not confess his involvement in the conspiracy, he certainly took himself out of it by cooperating fully with the government; that once he turned informant he was no longer a member of the conspiracy; and that he did everything the government wanted him to do to undermine the conspiracy and bring its remaining members to justice.

This is not a bad argument. And the government may be short-sighted to claim a right to use an informant's recorded calls in evidence against him: the existence of such a right would increase the risk of turning informant, and without informants the government's efforts to stop the drug traffic would be entirely futile. All this said, however, we think the district court was correct to deny Patel's motion to exclude Sheth's statements.

There are two points, one evidentiary and one substantive. The evidentiary point is that the very absence of formalities required for a conspiracy makes it more difficult than in a formal contract to know when an

individual's participation has ceased. A period of quiescence cannot be equated with a clean break.

The substantive point is that having set in motion a criminal scheme, a conspirator will not be permitted by the law to limit his responsibility for its consequences by ceasing, however definitively, to participate. Such cessation may or may not be effective withdrawal in a lay sense, but this is one of those places where the law uses a word in a special sense. You do not absolve yourself of guilt of bombing by walking away from the ticking bomb. And similarly the law will not let you wash your hands of a dangerous scheme that you have set in motion and that can continue to operate and cause great harm without your continued participation. The courts hold that for withdrawal to limit a conspirator's liability and (the novelty of the present case) his exposure to statements by co-conspirators, "mere cessation of activity is not enough ...; there must also be affirmative action, either the making of a clean breast to the authorities, or communication of the abandonment in a manner calculated to reach co-conspirators. And the burden of withdrawal lies on the defendant." *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir.1964) (Friendly, J.) (citation omitted).

This formulation - endorsed implicitly in *United States v. United States Gypsum Co.*, 438 U.S. 422, 463-65, 98 S.Ct. 2864, 2886-88, 57 L.Ed. 2d 854 (1978), and explicitly in many cases in this and other circuits, see, e.g., *United States v. Dom*, 561 F.2d 1252, 1256 (7th Cir.1977) (per curiam); *United States v. Andrus*, 775 F.2d 825, 850 (7th Cir.1985) - closes the door on Patel's argument. See also *United States v. Juodakis*, 834 F.2d 1099, 1102-03 (1st Cir. 1987). Patel did not communicate his abandonment to any of his

co-conspirators and he did not make a clean breast to the authorities. On the contrary, his efforts to exculpate himself in his first call to Sheth aroused Sheth's suspicious, reducing the likelihood that Sheth would come to the United States and be bagged with the rest of the conspirators. And, judging by the tenor of the phone calls, Sheth was the kingpin of the smuggling ring. Granted, the government was maladroit in instructing Patel to use the word "hashish." But this was not the only signal likely to arouse Sheth's suspicious, and the others were the initiative of Patel, who may have been trying to warn Sheth while obscuring his own complicity, and was certainly trying to do the latter.

As pointed out in *Borelli* and *Juodakis*, at some point after a conspirator's active involvement in the conspiracy ends it becomes unreasonable to hold him responsible for the acts of the remaining conspirators. But that precept is not applicable here. The statements made by Sheth that incriminated Patel were made at the time when the scheme for the importation and distribution of the shipment of hashish was *in medias res*, and were in furtherance of the conspiracy, see *Garlington v. O'Leary*, 879 F.2d 277, 282-285 (7th Cir. 1989), albeit the conspirators no longer had a realistic prospect of success.

AFFIRMED.

APPENDIX B



United States Court Of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

August 29, 1989

Hon. Richard A. Posner, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Jesse E. Eschbach, Senior Circuit Judge

| | | |
|---------------------------------|------|-----------------------------------|
| United States of America |) | Appeal from the |
| |) | United States District Court |
| Plaintiff-Appellee, |) | for the |
| |) | Northern District of Illinois, |
| NO. 88-2738 | -vs- |) Eastern Division. |
| |) | |
| MANU PATEL, |) | No. 88 CR 80 |
| |) | |
| Defendant-Appellant. |) | Charles P. Kocoras, <u>Judge.</u> |

ORDER

On Consideration of the petition for rehearing and suggestion for rehearing in banc filed in the above-entitled cause by Defendant-Appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, **DENIED.**



APPENDIX C

United States Court Of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 6, 1989

Hon. Richard A. Posner, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Jesse E. Eschbach, Senior Circuit Judge

| | | |
|---------------------------------|------|-----------------------------------|
| United States of America |) | Appeal from the |
| |) | United States District Court |
| Plaintiff-Appellee, |) | for the |
| |) | Northern District of Illinois, |
| NO. 88-2738 | -vs- |) Eastern Division. |
| |) | |
| MANU PATEL, |) | No. 88 CR 80 |
| |) | |
| Defendant-Appellant. |) | Charles P. Kocoras, <u>Judge.</u> |

AMENDED ORDER

The petition for rehearing complains about the failure of the court to discuss every issue raised by the appeal. When issues patently lack merit, the reviewing court is not obliged to devote scarce judicial resources to a written discussion of them. In the present case, the court, having carefully considered each of the issues raised by the appeal, confined its opinion to the sole issue having arguable merit. Having studied the papers filed in connection with the petition for rehearing, the court is satisfied that the remaining issues indeed lack merit and do not require discussion. The petition is therefore DENIED.

(C-1)

(2)
No. 89-922

Supreme Court, U.S.

FILED

FEB 9 1990

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

MANU PATEL, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

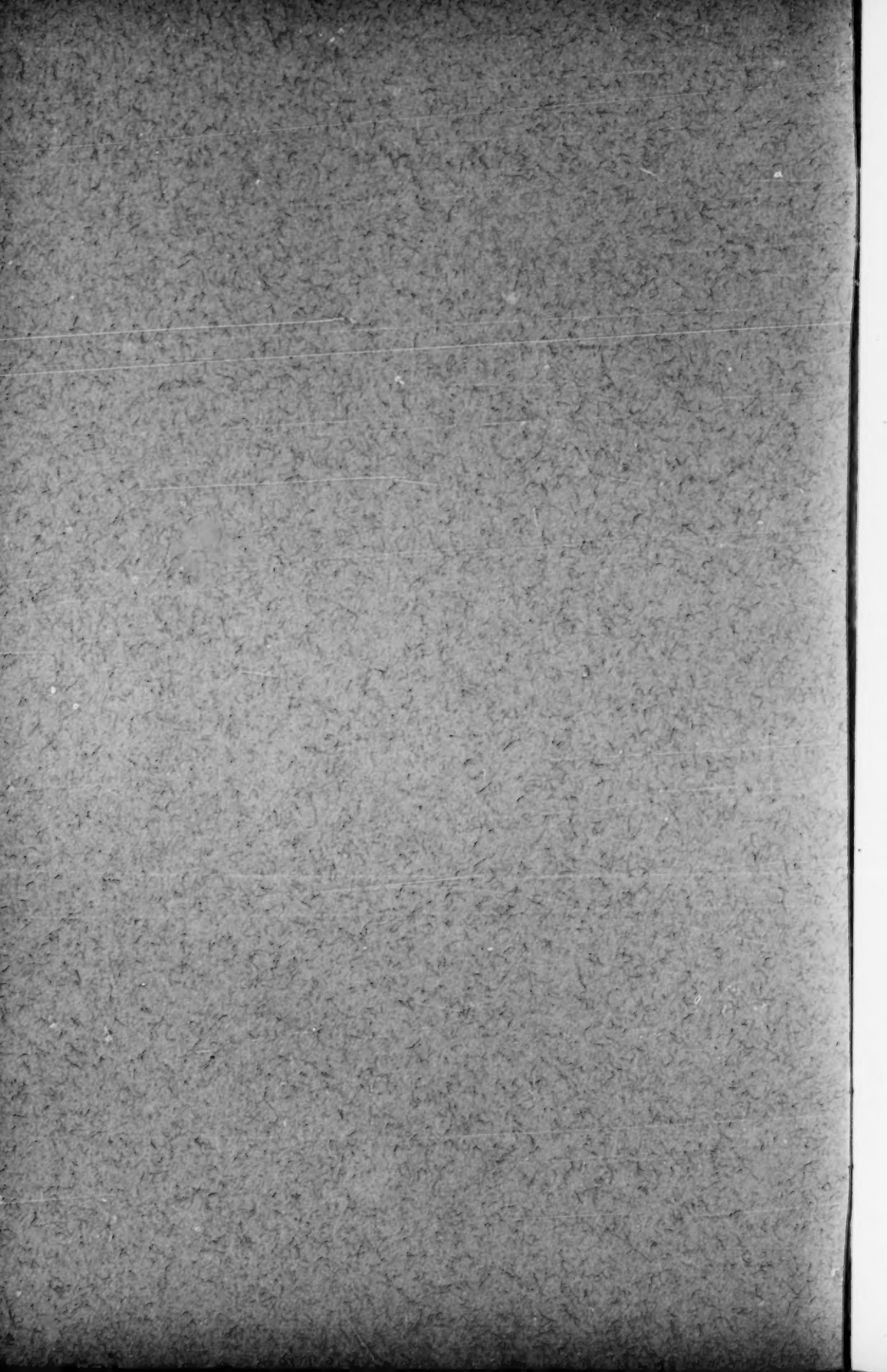
KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

*Department of Justice
Washington, D.C. 20530
(202) 633-2217*

17112



QUESTIONS PRESENTED

1. Whether statements made by a co-conspirator to petitioner after petitioner had been arrested were made during the course of and in furtherance of the conspiracy, and were therefore admissible under Fed. R. Evid. 801(d)(2)(E).

2. Whether petitioner had withdrawn from the conspiracy at the time the statements were made, when he had been arrested and was cooperating with the government but was still concealing his own involvement in the conspiracy.



TABLE OF CONTENTS

| | Page |
|---------------------|------|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 4 |
| Conclusion | 11 |

TABLE OF AUTHORITIES

Cases:

| | |
|-----------------------------------------------------------------------------------------------------------------|---------|
| <i>Bryson v. United States</i> , 396 U.S. 64 (1969) | 10 |
| <i>Hyde v. United States</i> , 225 U.S. 347 (1912) | 9, 10 |
| <i>Krulewitch v. United States</i> , 336 U.S. 440 (1949) | 7 |
| <i>United States v. Ammar</i> , 714 F.2d 238 (3d Cir.), cert. denied, 464 U.S. 936 (1983) | 5 |
| <i>United States v. Andrus</i> , 775 F.2d 825 (7th Cir. 1985) | 8 |
| <i>United States v. Aquafredda</i> , 834 F.2d 915 (11 Cir. 1987), cert. denied, 108 S. Ct. 1278 (1988) ... | 5 |
| <i>United States v. Borelli</i> , 336 F.2d 376 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965) | 4, 9 |
| <i>United States v. Bounos</i> , 730 F.2d 468 (7th Cir. 1984) | 6 |
| <i>United States v. Casamayor</i> , 837 F.2d 1509 (11th Cir. 1988), cert. denied, 109 S. Ct. 813 (1989) | 5, 8 |
| <i>United States v. Garrett</i> , 720 F.2d 705 (D.C. Cir. 1983), cert. denied, 465 U.S. 1037 (1984) | 8 |
| <i>United States v. Gibbs</i> , 739 F.2d 838 (3d Cir. 1984), cert. denied, 469 U.S. 1106 (1985) | 8 |
| <i>United States v. Grubb</i> , 527 F.2d 1107 (4th Cir. 1975) | 5 |
| <i>United States v. Guerra</i> , 693 F.2d 10 (1st Cir. 1982) | 5, 7, 8 |

IV

Cases — Continued:

| | Page |
|-----------------------------------------------------------------------------------------------------------------------------------------------|----------------|
| <i>United States v. Hamilton</i> , 689 F.2d 1262 (6th Cir. 1982) | 7 |
| <i>United States v. Hickey</i> , 596 F.2d 1082 (1st Cir.), cert. denied, 444 U.S. 853 (1979) | 5 |
| <i>United States v. Jannotti</i> , 729 F.2d 213 (3d Cir.), cert. denied, 469 U.S. 880 (1984) | 8 |
| <i>United States v. Juodakis</i> , 834 F.2d 1099 (1st Cir. 1987) | 8 |
| <i>United States v. Killian</i> , 524 F.2d 1268 (5th Cir. 1975), cert. denied, 425 U.S. 935 (1976) | 5 |
| <i>United States v. Lewis</i> , 759 F.2d 1316 (8th Cir.), cert. denied, 474 U.S. 994 (1985) | 8 |
| <i>United States v. Meacham</i> , 626 F.2d 503 (5th Cir. 1980), on reh'g, 676 F.2d 1359 (11th Cir.), cert. denied, 459 U.S. 1040 (1982) | 5 |
| <i>United States v. Persico</i> , 832 F.2d 705 (2d Cir. 1987), cert. denied, 108 S. Ct. 1995 (1988) | 5 |
| <i>United States v. Phillips</i> , 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982) | 8-9 |
| <i>United States v. Saavedra</i> , 684 F.2d 1293 (9th Cir. 1982) | 5 |
| <i>United States v. Shively</i> , 715 F.2d 260 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984) | 6-7 |
| <i>United States v. Taylor</i> , 802 F.2d 1108 (9th Cir. 1986), cert. denied, 479 U.S. 1094 (1987) | 5, 6, 8, 10 |
| <i>United States v. Towers</i> , 775 F.2d 184 (7th Cir. 1985) | 5 |
| <i>United States v. Troutman</i> , 814 F.2d 1428 (10th Cir. 1987) | 8 |
| <i>United States v. United States Gypsum Co.</i> , 438 U.S. 422 (1978) | 9 |
| <i>United States v. Varella</i> , 692 F.2d 1352 (11th Cir. 1982), cert. denied, 463 U.S. 1210 (1983) | 5, 6, 8 |
| <i>United States v. Walker</i> , 796 F.2d 43 (4th Cir. 1986) | 8 |

V

| Statutes and rule: | Page |
|----------------------------------|---------|
| 21 U.S.C. 841(a)(1) | 2 |
| 21 U.S.C. 846 | 2 |
| 21 U.S.C. 952 | 2 |
| 21 U.S.C. 963 | 2 |
| Fed. R. Evid. 801(d)(2)(E) | 3, 6, 8 |

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-922

MANU PATEL, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 879 F.2d 292.

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1989. A petition for rehearing was denied on August 29, 1989, and an amended order denying rehearing was entered on September 6, 1989 (Pet. App. B1, C1). The petition for a writ of certiorari was filed on October 27, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted

on one count of conspiracy to possess hashish with intent to distribute it, in violation of 21 U.S.C. 846; one count of conspiracy to import hashish, in violation of 21 U.S.C. 963; one count of importation of hashish, in violation of 21 U.S.C. 952; and one count of possession of hashish with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 17-1/2 years' imprisonment, to be followed by five years' supervised release. He was also fined \$20,000.

The evidence at trial established that petitioner was the owner of a company that in January 1988 received a shipment from the Apex Trading Agency in Bombay, India. The customs documents showed that the 67 crates in the shipment contained wooden furniture and handicrafts, but in the course of a random examination of one of the crates, a Customs inspector found that it contained blocks of hashish. A drug detecting dog indicated that seven or eight additional crates contained drugs. The shipment was allowed to go on its way, with federal agents watching its delivery. Petitioner received the shipment at a warehouse, where he had the crates stored. When petitioner returned a few days later to move the shipment, federal agents arrested him. The agents told petitioner that he was being arrested for possession of hashish with intent to distribute it, and asked him if he would cooperate with the government. Petitioner showed surprise, said that he had nothing to hide, and agreed to cooperate with the government. Pet. App. A2; Gov't C.A. Br. 6-8.

Petitioner told the agents that this was the third shipment he had received from his partner in India, Navin Sheth; the first two, he said, had contained spices and groceries. Petitioner said that Sheth would soon call him from India to tell him how to distribute the latest shipment. After each of the two earlier shipments, petitioner added, Sheth had come from India and, together with two other Indian men,

had taken parts of the shipments away before anything had been uncrated. Pet. App. A2; Gov't C.A. Br. 10.

Petitioner agreed to make a recorded telephone call to Sheth in which he would tell Sheth that he had discovered hashish in the shipment when one of the crates had broken open during unloading. Several calls were subsequently made; the conversations were conducted in an Indian dialect, and each was recorded, translated, and transcribed. As a result of the information conveyed by Sheth in those calls and information obtained from calls placed by petitioner to the American members of the conspiracy, all those involved except Sheth were arrested. Pet. App. A2-A3; Gov't C.A. Br. 11-15.

After the conversations between petitioner and Sheth were translated and transcribed, it was clear that the story petitioner had told the DEA was false, as was his claim of ignorance that the shipment contained hashish. In the first call, for example, Sheth expressed surprise that petitioner said that he did not recall when and how the shipment would be distributed. Sheth replied that petitioner had been told about it and asked, "Why did you forget?" Sheth reminded petitioner that he was to call himself "Raj" and that someone else calling himself "John" would call him at a certain time. Petitioner used the word "hashish" several times, and at one point Sheth asked, "Why are you using those words?" * * * You know about all this to be not using them." Pet. App. A3; Gov't C.A. Br. 15-18.

Transcripts of the recorded conversations between petitioner and Sheth were introduced at petitioner's trial, over his objection. Petitioner argued that Sheth's statements were not properly admitted as a co-conspirator's statements under Fed. R. Evid. 801(d)(2)(E) because the conspiracy had terminated by the time he spoke with Sheth or, at least, he had withdrawn from the conspiracy by that time. The district court rejected those arguments, and the court of

appeals did likewise. The court of appeals referred to the principle adopted by it and other courts of appeals that withdrawal from a conspiracy is not shown by mere cessation of activity. Rather, "there must also be affirmative action, either the making of a clean breast to the authorities, or communication of the abandonment in a manner calculated to reach co-conspirators." Pet. App. A6, (quoting *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.)). Because petitioner had lied about his involvement in the conspiracy and had continued to try to hide his complicity while talking on the phone to Sheth, and perhaps had even attempted to alert Sheth that the authorities knew of the smuggling scheme, the court of appeals found that the statements made by Sheth that incriminated petitioner were made during the course of the conspiracy and in furtherance of it. Pet. App. A7.

ARGUMENT

1. Petitioner first contends (Pet. 10-16) that Sheth's statements incriminating him were erroneously admitted as co-conspirator declarations because, at the time of the telephone calls, petitioner had been arrested and the hashish had been seized, so that the objectives of the smuggling conspiracy had been defeated and the conspiracy had therefore terminated. He claims that the decision of the courts below rejecting that argument is inconsistent with decisions of this Court and the courts of appeals. In fact, there is no conflict on this issue. The finding in this case that the statements were made during the course of an ongoing conspiracy is fully consistent with the rules established by this Court and the courts of appeals for determining when a conspiracy has ended.

The courts of appeals have recognized that there is no simple test for determining when a conspiracy has termi-

nated; such a finding depends on the particular facts of each case. *United States v. Aquafredda*, 834 F.2d 915, 919 (11th Cir. 1987), cert. denied, 108 S. Ct. 1278 (1988); *United States v. Persico*, 832 F.2d 705, 715-716 (2d Cir. 1987), cert. denied, 108 S. Ct. 1995 (1988); *United States v. Varella*, 692 F.2d 1352, 1362 (11th Cir. 1982), cert. denied, 463 U.S. 1210 (1983); *United States v. Hickey*, 596 F.2d 1082, 1089-1090 (1st Cir.), cert. denied, 444 U.S. 853 (1979). It is clear that neither the arrest of some of the co-conspirators nor the impossibility of successfully completing the goals of the scheme necessarily means that the conspiracy has terminated. In a number of cases, including five of the seven cases petitioner cites (Pet. 12-13), courts have held that the conspiracy continued after the arrest of one or more of the conspirators. *E.g.*, *United States v. Casamayor*, 837 F.2d 1509, 1513 (11th Cir. 1988), cert. denied, 109 S. Ct. 813 (1989); *United States v. Persico*, 832 F.2d at 715-716; *United States v. Taylor*, 802 F.2d 1108, 1117 (9th Cir. 1986), cert. denied, 479 U.S. 1094 (1987); *United States v. Towers*, 775 F.2d 184, 189 (7th Cir. 1985); *United States v. Ammar*, 714 F.2d 238, 253-254 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States v. Guerro*, 693 F.2d 10, 13 (1st Cir. 1982); *United States v. Varella*, 692 F.2d at 1362; *United States v. Saavedra*, 684 F.2d 1293, 1299 (9th Cir. 1982).¹

¹ The two other cases petitioner cites, *United States v. Meacham*, 626 F.2d 503 (5th Cir. 1980), on reh'g, 676 F.2d 1359 (11th Cir.), cert. denied, 459 U.S. 1040 (1982), and *United States v. Killian*, 524 F.2d 1268 (5th Cir. 1975), cert. denied, 425 U.S. 935 (1976), do not conflict with the decision below. In *Killian*, the court, in affirming the defendants' convictions, merely noted that it thought that certain post-arrest statements would not have been admissible against the defendants who did not make the statements. 524 F.2d at 1272. In *Meacham*, the court, while concluding that the conspiracy in that case had ended when the conspirators were arrested, distinguished its conclusion from the holding of *United States v. Grubb*, 527 F.2d 1107 (4th Cir. 1975), where the court had concluded that statements made after the arrest of some

In *Taylor*, for example, the defendant was unaware that his co-conspirators had been arrested trying to sell blank corporate bonds to an undercover FBI agent. The next day agents recorded Taylor's telephone conversation with a stockbroker in which Taylor "was seeking to carry out [the conspiracy's] next step—receipt of his commission for introducing the buyer and seller." 802 F.2d at 1117. In these circumstances, the court of appeals held that Taylor was still operating in furtherance of the conspiracy when he made the telephone call and that his statements were therefore admissible against the arrested co-conspirators under Rule 801(d)(2)(E). 802 F.2d at 1117. In *Varella*, the court of appeals upheld the admission of statements made by several conspirators following their arrest and the seizure of the marijuana they had been planning to import and distribute. The court found that the conspiracy clearly extended beyond the date of the arrests and seizure because the conspirators had made continuing efforts to find out what had become of the marijuana, discussed how to minimize their losses, and debated the apportionment of the loss and possible recovery through another importation. 692 F.2d at 1361-1362.

Nor does it matter that it has become impossible for the conspiracy to succeed, or even that its ends were from the beginning unattainable. *United States v. Bounos*, 730 F.2d 468, 470 (7th Cir. 1984); *United States v. Shively*, 715

conspirators were admissible under Rule 801(d)(2)(E). 626 F.2d at 510-511 n.8. It thus recognized that a conspiracy may continue beyond the arrest of some of the conspirators. The court concluded that the conspiracy had terminated at the time of the arrest in *Meacham* because "[t]he evidence introduced at trial showed that the defendants' criminal activities ended" at that time. 626 F.2d at 511 n.8. In this case, in contrast, the evidence showed that the conspirators other than petitioner continued to seek to distribute the hashish after petitioner's arrest.

F.2d 260, 266 (7th Cir. 1983), cert. denied, 465 U.S. 1007 (1984); *United States v. Hamilton*, 689 F.2d 1262, 1269 (6th Cir. 1982) (conspiracy continued even though co-conspirator was arrested and acting as government agent; "it is no defense that success was impossible because of unknown circumstances"), cert. denied, 459 U.S. 1117 (1983). "Success is never a necessary attribute of a conspiracy." *United States v. Guerro*, 693 F.2d at 13.

The facts of this case fit easily within the guidelines offered by these and other cases. The other conspirators had no knowledge of petitioner's arrest and cooperation with the government when they talked to him about further arrangements for the distribution of the hashish. The conspiracy clearly continued after petitioner's arrest and the statements made by Sheth were made in furtherance of the scheme.

Nor, contrary to petitioner's contention (Pet. 14), is this conclusion inconsistent with *Krulewitch v. United States*, 336 U.S. 440 (1949). In that case the Court found that the conspiracy had definitely ended before the statements at issue were made. But as the Court noted, the conversation in question occurred long after the central aim of the alleged conspiracy—transportation of the complaining witness to Florida for prostitution—had ended. The trip to Florida had already been made, the complaining witness had left Florida and resumed her residence in New York, and all those involved had been arrested. 336 U.S. at 442. The Court's holding that in those circumstances the conspiracy had ended says nothing about the quite different facts of this case, where the hashish had not been distributed at the time of the conversations.²

² Petitioner complains (Pet. 15) that the cases relied on by the government in the court of appeals dealt only with the question whether a defendant may be found guilty of conspiracy, and not with the

2. Petitioner also contends (Pet. 16-20) that the court of appeals erred by holding that he had not adequately shown his withdrawal from the conspiracy. Once again, however, the holding of the court below on this fact-bound issue is in complete accord with other decisions.

As the court of appeals noted (Pet. App. A5), the courts are in agreement that in order to establish one's withdrawal from a conspiracy, mere cessation of activity is not enough. Some affirmative act of withdrawal is required, typically either a full confession to the authorities or some communication to one's co-conspirators that one has abandoned the conspiracy. And it is the defendant's burden to demonstrate withdrawal. *United States v. Juodakis*, 834 F.2d 1099, 1102 (1st Cir. 1987); *United States v. Troutman*, 814 F.2d 1428, 1447-1448 (10th Cir. 1987); *United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986); *United States v. Andrus*, 775 F.2d 825, 850 (7th Cir. 1985); *United States v. Lewis*, 759 F.2d 1316, 1347-1348 (8th Cir.), cert. denied, 474 U.S. 994 (1985); *United States v. Gibbs*, 739 F.2d 838, 845 (3d Cir. 1984), cert. denied, 469 U.S. 1106 (1985); *United States v. Jannotti*, 729 F.2d 213, 221 (3d Cir.), cert. denied, 469 U.S. 880 (1984); *United States v. Garrett*, 720 F.2d 705, 714 (D.C. Cir. 1983), cert. denied, 465 U.S. 1037

question whether statements offered under the co-conspirator exception to the hearsay rule were made in furtherance of the conspiracy. In our view, a determination concerning the duration and termination of a conspiracy is the same whether made for purpose of determining a defendant's membership in the conspiracy or for the purpose of determining whether to admit evidence of statements made in furtherance of the conspiracy. In any event, a number of the cases cited above dealt specifically with the precise issue raised in this case, whether statements were admissible under Rule 801(d)(2)(E) as having been made during the course of and in furtherance of the conspiracy. *E.g.*, *United States v. Casamayor*, 837 F.2d at 1513; *United States v. Taylor*, 802 F.2d at 1117; *United States v. Guerro*, 693 F.2d at 13; *United States v. Varella*, 692 F.2d at 1362.

(1984); *United States v. Phillips*, 664 F.2d 971, 1018 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States v. Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.), cert. denied, 379 U.S. 960 (1965). This Court has also approved the same general formulation, that is, that some affirmative act is necessary to demonstrate withdrawal. *United States v. United States Gypsum Co.*, 438 U.S. 422, 463-465 (1978); see also *Hyde v. United States*, 225 U.S. 347, 369 (1912).³

The reasoning behind the rule that a defendant must show an affirmative act demonstrating withdrawal was explained by the court of appeals. First, the informal nature of a conspiracy makes it more difficult than in the case of a formal contract to know the exact extent of one person's participation. "A period of quiescence," therefore, "cannot be equated with a clean break." Pet. App. A6. Second, the

³ Petitioner criticizes (Pet. 19) the court of appeals' characterization of the *Gypsum* case as implicitly endorsing its formulation of the necessary showing for withdrawal. He points out that in *Gypsum* this Court reversed a conviction because an instruction confined the allowable methods for proving withdrawal to only two—either notifying the conspirators of withdrawal from the scheme or disclosing the illegal scheme to the authorities. However, the Court approved the general rule that some affirmative behavior must be shown in order to establish withdrawal. 438 U.S. at 464-465. The problem in *Gypsum* was that the facts of the case allowed another logical method for showing withdrawal—specifically, the resumption of competitive behavior, such as price cutting or price wars—as an affirmative action that would show withdrawal from a price-fixing conspiracy. And although the defense in the *Gypsum* case argued just such a theory, the trial court refused to include in the jury instructions a charge that such an affirmative act demonstrated withdrawal. 438 U.S. at 463-464.

The court of appeals' decision in this case does not conflict with the *Gypsum* decision. The court quoted a case that mentioned the same two methods of withdrawal in the *Gypsum* instruction, but the court also specifically stated that there were other ways to withdraw from a conspiracy. Pet. App. A5. In this case, however, petitioner did not show that he withdrew by some other method.

law must act to prevent a conspirator from limiting his responsibility for setting in motion a criminal scheme merely by ceasing his own participation. As the court below put it, "[y]ou do not absolve yourself of guilt of bombing by walking away from the ticking bomb." *Ibid.*; see also *Hyde v. United States*, 225 U.S. at 369-370 ("[a]s he has started evil forces he must withdraw his support from them or incur the guilt of their continuance").

The fact that petitioner had been arrested and was purporting to cooperate with the authorities did not suffice in this case to constitute withdrawal. As the court of appeals noted (Pet. App. A6-A7), petitioner did not reveal the true nature of the conspiracy and his own involvement in it when he agreed to cooperate. His false representations as well as his efforts in his telephone call to Sheth to obscure his own complicity aroused Sheth's suspicions and probably contributed to the government's failure to apprehend Sheth, who was apparently the kingpin of the smuggling operation. *Ibid.* Petitioner's misleading pretense of full cooperation cannot be considered the kind of affirmative act necessary to show his clear abandonment of the conspiracy. See *United States v. Taylor*, 802 F.2d at 1117.

Petitioner also claims (Pet. 18) that the holding of the court of appeals results in a rule that requires a defendant to make an unconstitutional choice between incriminating himself and protecting himself from the use of his co-conspirators' statements. But the government has forced no such choice. Petitioner could simply have remained silent when he was arrested and refused to offer any cooperation to the authorities. Or he could have contacted the others involved on his own and made it clear to them that he was playing no further part in their scheme. But he cannot claim the right to lie to the government and then expect the law's protection of his choice. See *Bryson v. United States*, 396 U.S. 64, 72 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

FEBRUARY 1990